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No. 84-1724

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD A. SNIDER and

MARGARET Q. SNIDER,

Appellants,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal From The Supreme Court
Of The Commonwealth of Virginia

BRIEF AND APPENDIX OF AMICUS CURIAE, ATTORNEY GENERAL OF VIRGINIA ON BEHALF OF VIRGINIA BOARD OF EDUCATION

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The Interest of the Amicus Curiae

Pursuant to Supreme Court Rule 36, the Attorney General of Virginia, as amicus curiae, files this brief for the Virginia Board of Education. The appellants challenge, on federal constitutional grounds, Virginia's compulsory school attendance requirements. The Commonwealth of Virginia has a fundamental and irrefutable interest in a well-educated citizenry. The statutory law challenged in this appeal represents and expresses that basic interest and objective, as enacted by the Virginia General Assembly and supported by the Virginia Board of Education and the State Superintendent of Public Instruction. For the reasons hereinafter set out, the amicus curiae respectfully supports dismissal of this appeal or affirmance of the judgment below.

Summary of Argument

The challenged statutory law, on its face, is broadly tolerant of religious freedoms. It reasonably accommodates individual beliefs with the interest of the Commonwealth in a well-educated citizenry. The judgment below is based upon narrow evidentiary findings of the Henrico County Circuit Court. Accordingly, the judgment below raises no issue of

national importance. Moreover, the Virginia compulsory school attendance law, challenged in this appeal, has been substantially amended since the decision below, to allow home instruction by a child's parent through use of a correspondence course. It is unnecessary, therefore, for this Court to consider the question of whether the state's former compulsory school attendance law, which prohibited unapproved home instruction as a substitute for school, is constitutionally infirm. No federal constitutional issue or question of national importance is presented.

Argument

The fundamental interest of the state in promoting an educated citizenry has been repeatedly recognized and affirmed by this Court. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213, 237, 238-239 (1972); McCollum v. Board of Education, 333 U.S. 203, 212 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). While parents have a constitutional right to send their children to private schools and to select private schools offering specialized instruction, they have "no constitutional

right to provide their children with private education unfettered by reasonable government regulation." Runyon v. McCrary, 427 U.S. 160, 178 (1976), Board of Education v. Allen, 392 U.S. 236 (1968). This Court, despite its profound concern for the accommodation of religious beliefs by state compulsory attendance laws, has lent:

> "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."

Wisconsin v. Yoder, supra. at 239.

The Virginia compulsory school attendance law on its face provides broad tolerance and accommodation to the religious beliefs of its citizens. As it existed when this case was decided by the state court below (November 1983), the Virginia statute provided specific alternatives to public school attendance and specific exemptions. See § 22.1-256 of the Code of Virginia reprinted in the Jurisdictional Statement, at 7. For example, any pupil who, together with his parents, was conscientiously opposed to school attendance by reason of bona fide religious training or belief, could be excused. Consistent with Yoder, the compulsory school

attendance law provided that "bona fide religious training or belief" excluded essentially political, sociological or philisophical views or a merely personal moral code. See § 22.1-257 of the Code of Virginia reprinted in the Jurisdictional Statement, at 8-9.

That statute, challenged by appellants, was upheld by the Virginia Supreme Court a year prior to the decision below in this case. See Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (Va. 1982). See also, Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (Va. 1948) upholding an earlier version of the challenged state statute.

The decision below involving appellants, however, is not based upon federal constitutional issues; it is a decision pivoting upon a question of fact: whether bona fide religious beliefs, were, or were not, demonstrated by the evidence. The court below found, on the evidence presented, that the appellants were following their own idiosyncratic interpretations permitting only home-correspondence course instruction for their children. The appellants' views, the trial court found, were not bona fide religious beliefs shared by their Church, or even by all members of their fundamentalist

group within the Catholic Church. There is no contest here that the appellants were not provided a fair hearing.

This appeal fundamentally raises nothing more than an issue regarding the sufficiency of the evidence before the trial court. There is no valid reason for this Court to resolve afresh the underlying factual dispute presented to the trial court. See Fry Roofing Co. v. Wood, 344 U. S. 157, 160 (1952).

Moreover, when this case was decided below, the then existing compulsory school attendance law did not permit home instruction of children by an unapproved tutor or teacher to supplant school attendance. See Grigg, supra. Effective July 1, 1984, the Virginia compulsory school attendance law was amended to permit home schooling by parents when certain statutory criteria are met. The current statute specifically permits the use of approved home correspondence courses as a substitute for school attendance. This changed legislative policy is clearly stated in the introduction to the amended statute:

> "When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of

> education under the policy of the Commonwealth of Virginia." § 22.1-254.1(A).[1]

Further, under the amended statute, the Attorney General of Virginia has held that parents who demonstrate that school attendance and its statutory equivalents, such as home instruction, do not accommodate their bona fide religious beliefs, may be completely excused from Virginia's compulsory school requirements. See 1983-1984 Report of the Attorney General at 305.

In short, appellants ask this Court to perform two exercises: (1) to reexamine the evidence presented to the trial court and (2) to strike down a statute which no longer exists, and which, on its face, does not violate any religious freedom. This Court, it is respectfully urged, should decline to engage in such exercises.

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[1] This entire statutory provision, which adds the allowance for home schooling, is reprinted in the Appendix to this Brief.

Conclusion

For the reasons stated herein, this appeal should be either dismissed or judgment below affirmed.

Respectfully submitted,

ATTORNEY GENERAL OF
VIRGINIA ON BEHALF OF
THE VIRGINIA BOARD OF
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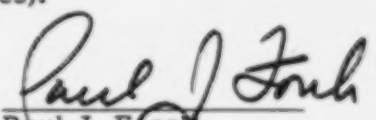
Certificate of Service

I hereby certify, in accord with Supreme Court Rule 28.5(b), that on the 3rd day of June, 1985, I mailed three copies of this Brief and Appendix of Amicus Curiae to the

following counsel of record in this appeal by first class postage, prepaid: William A. Beeton, Jr., Esquire, 3817 Plaza Drive, Fairfax, Virginia 22030 (Attorney for Appellants) and H. Albert Nance, Jr., Esquire, Commonwealth's Attorney for the County of Henrico, Virginia, P. O. Box 27032, Richmond, Virginia (Attorney for Appellees).



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APPENDIX

Section 22.1-254.1 of the Code of Virginia provides:

> Declaration of policy; requirements for home instruction of children. A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the seventeenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Board of Education; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.
>
> B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the

criteria for providing home instruction as required by paragraph A of this section. The division superintendent shall notify the Superintendent of Public Instruction of the persons approved to provide home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation or assessment which, in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this paragraph is not provided by the parent, home instruction shall cease and the parent shall make other arrangements for the education of the child which comply with § 22.1-254 of the Code of Virginia.

D. For the purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-257 of the Code.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be borne by the party appealing.